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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0938**

Mary Ellen Slattery,
Personal Representative of the Estate of
Marcella S. Curran a/k/a
Marcella Sally Curran a/k/a
M. Sally Curran a/k/a
Marcella E. Curran a/k/a
Sally Elizabeth Curran,
Appellant,

vs.

Ronald P. Niemala,
Respondent,

KSKJ Life, American Slovenian Catholic Union,
an Illinois corporation,
Respondent.

**Filed January 13, 2014
Affirmed in part, reversed in part, and remanded
Crippen, Judge***

Itasca County District Court
File No. 31-CV-12-1252

Kent E. Nyberg, Grand Rapids, Minnesota (for appellant)

Livia E. Babcock, Meagher & Geer, PLLP, Minneapolis, Minnesota (for respondent
Ronald P. Niemala)

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respondent KSKJ Life)

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

Considered and decided by Kalitowski, Presiding Judge; Connolly, Judge; and Crippen, Judge.

UNPUBLISHED OPINION

CRIPPEN, Judge

In this dispute on insurance practices, the personal representative of a deceased insured challenges the summary dismissal of counts stated in her complaint on breach of fiduciary duty and a right to cancel annuity contracts. We affirm dismissal of the fiduciary-duty claim, but because error is evident in the basis for the district court's dismissal on the decedent's right to cancel annuities, we reverse and remand for further proceedings on the merits of this claim.

FACTS

In May 2012, decedent Marcella Curran filed a lawsuit against respondents insurance agent Ronald P. Niemala and KSKJ Life, American Slovenian Catholic Union (KSKJ), a not-for-profit corporation providing insurance products. Curran alleged that Niemala, serving as her investment advisor and insurance agent, cashed out her annuities and purchased new annuities with KSKJ. Curran claimed that she was unaware that Niemala was purchasing the annuities, and that the improper transaction resulted in her incurring surrender fees arising from the sale of the prior annuities. She claimed, among other things, that Niemala breached a fiduciary duty and that she had a statutory right to cancel the annuity contracts. On June 24, 2012, Curran died, and appellant Mary Ellen

Slattery¹ became the substitute party in the lawsuit. Respondents moved for summary judgment.

Respondent Niemala asserted that in 2001, after he was introduced to Curran, she purchased annuities based on their rates. In 2004 or 2005, Curran asked Niemala how she could provide a steady income to her son. Niemala prepared a spreadsheet identifying the rates of return on Curran's contracts, their surrender charges,² and details about KSKJ annuities. Niemala recommended KSKJ annuities because they met Curran's goals of providing a greater rate of return than her prior annuities, providing her son a monthly income, allowing her to change the named income beneficiary to herself at any time, and protecting her assets from attachment by Medicaid. Niemala confirmed that Curran had sufficient liquidity to meet her needs without the money invested in the annuities.

In 2005, Curran purchased four annuities from KSKJ. The two annuities at issue are a retirement-income product, providing an income payment for life.³ Curran executed forms to surrender her prior annuities and signed the KSKJ form entitled: "Replacement of Life Insurance or Annuities." Niemala alleged that on December 17, 2005, he went to Curran's home to deliver an annuity certificate, but no one was home. Niemala left the certificate between the front door and its screen door. Niemala also alleged that on

¹ Slattery is the primary beneficiary of a trust in the name of Allen Curran, the son of Marcella Curran; Allen Curran is now deceased. The trust is the beneficiary of Marcella Curran's estate.

² Even with surrender charges, Curran would make more money by purchasing the KSKJ annuities because they offered a guaranteed return of 4.5%.

³ Two of the annuities Curran purchased from KSKJ were not fixed-period annuities and were surrendered to KSKJ and she was paid. The two remaining annuities are fixed.

February 7, 2006, he mentioned to Slattery that he had a certificate to deliver to Curran and she offered to deliver it to her. The first payments on the annuities began on December 8, 2005, and January 22, 2006. In 2007, Curran claimed that she did not receive the annuity certificates. Through her attorney, she requested duplicates. Curran received the duplicates on March 28, 2007. Curran requested to cancel the annuities several days later, on April 2, 2007.

The district court granted respondents' motion for summary judgment. This appeal is confined to the court's decision on two counts of Slattery's complaint. The court found that Niemala and Curran did not have a familial relationship; Niemala did not have control of her assets; and the fact that Curran worked with Niemala for several years and trusted him was insufficient to create a fiduciary relationship. The district court also found that because Curran accepted annuity payments up to filing the complaint in 2012 she waived her right to cancel the contracts; the court acknowledged that there was no evidence that Curran received the annuity certificates prior to March 28, 2007, and that she canceled the contracts on April 2, 2007, within the statutory time-frame under Minn. Stat. § 72A.51 (2012).

DECISION

A motion for summary judgment is granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. “We review a district court's summary judgment decision de novo. In doing so, we determine whether the district

court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citations omitted). We “view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). And “the party resisting summary judgment must do more than rest on mere averments.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). “[M]ere speculation, without some concrete evidence, is not enough to avoid summary judgment.” *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quotation omitted). A mere “scintilla of evidence” that may support the non-moving party’s position is not sufficient to avoid summary judgment. *Bondy v. Allen*, 635 N.W.2d 244, 248 (Minn. App. 2001) (quotation omitted).

Fiduciary duty

Slattery argues that Niemala owed Curran a fiduciary duty under Minn. Stat. § 45.026, subd. 1(b) (2012), because he acted as Curran’s financial planner. She argued to the district court that Niemala owed a fiduciary duty based on “special circumstances,” but the district court concluded that the asserted facts did not show the special circumstances that resembled those in earlier cases on the same issue. Slattery failed to raise a claim in district court that Niemala owed Curran a statutorily imposed fiduciary duty.⁴ In any event, Slattery has failed to assert the materiality of her claim of Niemala’s

⁴ The parties dispute whether Niemala identified himself as a financial planner, but Slattery concedes that she did not raise the issue in district court. This court generally will not review issues not considered by a district court. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that a “reviewing court must generally consider ‘only

fiduciary duty. She has neither asserted nor produced evidence for the record on the occurrence of any breach of the alleged fiduciary duty. Challenges unsupported by argument or authority are generally waived “unless prejudicial error is obvious on mere inspection.” *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quotation omitted). Accordingly, we affirm the district court’s grant of summary judgment in favor of respondents on Slattery’s breach-of-fiduciary-duty claim.

Cancellation

Slattery argues that Curran was entitled to cancel the contracts because she did so within 30 days of receiving the certificates. An individual may cancel a policy or contract “by returning the policy or contract and by giving written notice of cancellation any time before midnight of the tenth day following the date of purchase.” Minn. Stat. § 72A.51, subd. 2 (2012). “[D]ate of purchase’ means the date on which the purchaser receives a copy of the policy or contract.” *Id.*, subd. 1 (2012).

Although Niemala asserted that he left one certificate at Curran’s home on December 17, 2005, and entrusted Slattery to deliver the second certificate to Curran on February 7, 2006, the district court, in viewing the facts in the light most favorable to Slattery, properly determined that Curran did not receive the annuity certificates until

those issues that the record shows were presented and considered by the [district] court in deciding the matter before it” and that a party must establish genuine issues of fact to avoid summary judgment). Although we do have authority to review any issue “as the interest of justice may require,” we decline to address this issue in light of our conclusion that Slattery has failed to show or assert the materiality of the issue. Minn. R. Civ. App. P. 103.04; *State v. Peterson*, 266 Minn. 77, 83, 123 N.W.2d 177, 182 (1963) (stating that appellate courts have a “responsibility to review the record even though the assignments of error are inadequate”).

March 28, 2007, after she requested duplicates. The evidence demonstrates that Curran attempted to cancel the contracts on April 2, 2007. Therefore, Slattery's cancellation claim appears to survive respondents' summary judgment motion.⁵

Still, the district court concluded that "Curran waived her right to cancel the annuity contracts by accepting the benefits of the annuity contracts for a least one year prior to attempting to cancel the contracts." But under Minn. Stat. § 72A.51, subd. 4 (2012), "A person may not waive or surrender a right to cancel an insurance policy or contract under this section and section 72A.52." Curran could not waive her right to cancel the contracts under this statute.⁶ Because the district court conclusion rests on a misapplication of the law, we reverse the court's summary-judgment dismissal of Slattery's right-to-cancellation claim and remand for further proceedings on the merits of this claim.

Affirmed in part, reversed in part, and remanded.

⁵ The contracts provided a 30-day cancellation policy. Because Curran canceled within the 10 days provided by statute, we do not need to consider the more liberal contract language.

⁶ The statute affords a consumer 10 days in which to cancel a contract intending to protect a consumer from the consequences of hasty decisions or buyer's remorse. Although the statute on its face prohibits application of waiver, conduct inconsistent with cancellation, *i.e.*, collecting payments under the contract, arguably could be construed as abandonment of the right to cancel a contract. But respondents failed to provide authority or a persuasive reason to preclude application of section 72A.51, subdivision 4.